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In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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A. As the Second Circuit recognized in the decision below, Pet. App. 14a, its holding that Section 243(h) of the Immigration and Nationality Act (INA), 8 U.S.C. 1253(h), applies to the repatriation of Haitian migrants interdicted on the high seas squarely conflicts with the Eleventh Circuit's holding on that precise issue in *Haitian Refugee Center* v. *Baker*, 953 F.2d 1498, cert. denied, 112 S. Ct. 1245. In their August 3, 1992, motion to expedite consideration of this case, filed after the Court granted our application for a stay of the decision below, respondents specifically represented (at 2) that they "do not intend to oppose the granting of the writ on this issue." Indeed, they affirmatively urged the Court to *grant* certiorari—noting that "[i]n ruling on the stay

application, all nine members of this Court indicated their belief that there is a reasonable probability that certiorari will be granted on this question," Motion at 2—and to do so expeditiously, by treating our application for a stay as certiorari petition.

Now, without even acknowledging their prior submission, respondents have filed a brief opposing certiorari. But they advance no substantial reason why the Court should do so. To the contrary, respondents acknowledge (Br. in Opp. 3, 10) that the question of the extraterritorial application of 8 U.S.C. 1253(h) "divides the circuits" and presents a "direct conflict." Respondents simply assert (Br. in Opp. 1, 10) that review should be denied because the decision below is correct. It is not. The decision of the sharply divided panel below is gravely flawed in four fundamental respects, each sufficient in itself to warrant reversal.[1] But in addition, respondents' view of the decision below on the merits scarcely counsels against review, since two courts of appeals have reached directly conflicting results in broad class actions challenging the ongoing Haitian interdiction program. The result of the decision below is not only to prevent the United States from speaking with one voice (through the President) to the international community regarding

[1] For example, the only textual basis the court of appeals cited as affirmative support for its holding that 8 U.S.C. 1253(h) applies outside the United States was Section 1253(h)'s reference to "any alien." See Pet. App. 15a-16a, 21a, 23a. However, this Court has made clear that such general language does not overcome the presumption against extraterritorial application of Acts of Congress. See *Foley Bros.* v. *Filardo*, 336 U.S. 281, 282, 285 (1949); Pet. 17. Moreover, as we explain in the petition (at 17-28), all other indications in the text and legislative history of Section 1253(h)—as well as the text, negotiating history, and consistent State Department interpretation of the U.N. Convention on which Section 1253(h) is based—strongly support the conclusion that Section 1253(h) does not apply to aliens outside the United States.

the Nation's response to the Haitian migrant crisis, but also to prevent the courts themselves from speaking with one voice to the President and other Executive Branch officials regarding the scope of their discretion in fashioning that response. The Court should eliminate this dissonance on a matter of such major importance to the foreign policy of the United States and the administration of the immigration laws.

B. As a fallback position, respondents argue that if the Court grants certiorari, it should limit its review to the question of the extraterritorial reach of 8 U.S.C. 1253(h). Thus, they urge the Court to deny certiorari on the three other issues presented by our certiorari petition: whether judicial review is precluded by statute (see Pet. 12-14); whether respondents' claim under 8 U.S.C. 1253(h) is barred under principles of collateral estoppel by the Eleventh Circuit's decision in *HRC* v. *Baker* (see Pet. 14-17); and whether equitable principles bar entry of an injunction that interferes so drastically with responsibilities that the Constitution assigns to the President (see Pet. 28-29). See Br. in Opp. 1, 3, 10-23, 29. Yet even as respondents try to avoid having this Court consider these alternative grounds for reversing the judgment below, they state (Br. in Opp. 10 n.11) that they intend to urge alternative grounds for affirming that judgment. This is not the time for such tactical maneuvering.

Over the past year, the program established by the President for interdiction and repatriation of Haitian migrants has been the subject of repeated judicial assaults, which have consumed enormous resources of the lower courts and this Court, as well as Executive Branch agencies charged with implementing the President's policies. It is time to bring that litigation to a close. The Court should assure that it will be in a position to do so by having before it *all* of the issues and con-

sidérations that may bear on the proper disposition of the case.

1. The overriding question presented by this case remains precisely what we have stated it to be in the certiorari petition (at i): "Whether the court of appeals properly ordered the district court to enter a preliminary injunction barring implementation of Executive Order 12,807, which was issued by the President on May 24, 1992, to authorize repatriation directly to Haiti of Haitian migrants interdicted by the United States Coast Guard on the high seas." As we explain in the petition (at 11-12, 28-29), that injunction intrudes intolerably into matters assigned by the Constitution to the President: it interferes directly with the operation of military vessels under his command on the high seas; it upsets the delicate balance of diplomatic and other measures instituted by the President to restore democratic rule in Haiti and resolve the broader crisis affecting that country; and it threatens to induce a new and massive outflow of Haitian migrants that would once again strain the President's ability to carry out the Nation's immigration policy and enforce its immigration laws in the region. These consequences render this case one of great public importance that warrants review by this Court quite aside from the presence or absence of a circuit conflict on every issue subsumed in the central question of whether such an injunction should have been granted. The injunction is improper on four independent grounds, and there is no reason why the Court should artificially limit its review to only one of them.

2. Respondents nevertheless try to minimize the importance of the issues they seek to avoid by labeling them "extraneous" and "collateral" and as "lacking significance." See Br. in Opp. 3, 10. None of those labels is accurate.

a. The questions whether judicial review is altogether foreclosed by statute—and whether respondents' challenge to the interdiction program under 8 U.S.C. 1253(h) is barred as a threshold matter under collateral estoppel principles by virtue of the Eleventh Circuit's judgment in *HRC* v. *Baker*—are not extraneous or collateral. They are, instead, "antecedent" to the merits of respondents' challenge and are "ultimately dispositive of the present dispute." *Arcadia* v. *Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). Indeed, "congressional preclusion of review is in effect jurisdictional," *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 353 n.4 (1984), which underscores the need for this Court to have that issue before it at the outset.[2]

b. As respondents concede (Br. in Opp. 11), the Eleventh Circuit in *HRC* held that the INA *does* impliedly "preclude judicial review" here under the APA (5 U.S.C. 701(a)(1)), because the INA expressly provides for judicial review of refugee determinations and other issues at the behest of aliens in the United States, but not those beyond our borders. See Pet. App. 204a-209a. Because the Eleventh Circuit's reasoning on the preclusion issue should foreclose judicial review here, the *HRC* decision weighs strongly in favor of certiorari on that issue in this case.[3]

[2] The Court has held that although "congressional preclusion of judicial review is in effect jurisdictional" under *Block*, the issue may be waived by the government if it is not properly preserved. See *Air Courier Conf.* v. *American Postal Workers' Union*, 111 S. Ct. 913, 917 n.3 (1991). There is no suggestion in this case, however, that the government has waived the preclusion issue. We presented that issue below (Gov't 92-6144 C.A. Br. 59-63) and in our certiorari petition (at 28-29). Compare *Air Courier*, 111 S. Ct. at 917.

[3] As respondents point out, the Eleventh Circuit in *HRC* nevertheless considered (and rejected) on the merits the Haitian interdictees' challenge to the interdiction program under 8 U.S.C.

The same is true of the collateral estoppel issue. Respondents have previously conceded that certiorari is warranted in this case because the holding below on the reach of 8 U.S.C. 1253(h) squarely conflicts with the contrary holding in *HRC*. If the Court grants review on that issue, it would make no sense for the Court to close its eyes to the even more basic question of whether the holding in *HRC* not only conflicts with—but actually forecloses—respondents' reliance on 8 U.S.C. 1253(h) here.[4]

1253(h), finding that Section inapplicable to aliens beyond our borders. See Pet. App. 214a-216a. In doing so, the Eleventh Circuit identified no basis for judicial review independent of the APA. And there is none, since the APA is the only federal statute of any conceivable application here that authorizes a cause of action against federal officials. Nor do respondents offer any legal support for a cause of action independent of the APA. See Br. in Opp. 11 n.12.

[4] The collateral estoppel issue should be before the Court for an additional reason. Respondents defend the Second Circuit's refusal to find their reliance on 8 U.S.C. 1253(h) barred by collateral estoppel on the ground that the *HRC* class consisted of interdictees who were challenging the initial screening process, while the respondents here "already have been found to have credible fears of persecution" and were "screened in." See Br. in Opp. 18-19. This description of the interdictees before this Court conforms to the only class that has thus far been certified by the district court—the class of "screened in" interdictees who were challenging the procedures for reinterviewing at Guantanamo those "screened in" individuals who were found to have a communicable disease. Pet. App. 161a-162a. (Those procedures were the subject of the Second Circuit's June 10 decision that, relying on the Due Process Clause, requires that screened-in interdictees at Guanatanmo be afforded a right to counsel in connection with any further interviews there. *Id.* at 73a-124a.)

Thus, even if the Second Circuit's legal ruling regarding the extraterritorial application of 8 U.S.C. 1253(h) were correct, respondents effectively concede in this Court that an injunction properly could only run in favor of those Haitian migrants who had been

c. In addition, whether the INA forecloses any role for the courts in circumstances such as these is an important issue that warrants certiorari in its own right. Congress's traditional unwillingness to permit judicial review of immigration decisions concerning aliens who have "never presented [themselves] at the borders," *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956), serves to recognize and preserve the primacy and discretion of the President and those in the Executive Branch who implement his policies affecting foreign nations and their nationals abroad. The President's policies in such areas should not be held to be subject to judicial review in the absence of a statute expressly so providing. *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992). As the experience surrounding this case and *HRC* amply demonstrates, judicial second-guessing of the Executive's policy judgments in this setting can profoundly disrupt military operations and the conduct of the Nation's foreign policy. Even if the Court rejects respondents' challenge on the merits, the fact that litiga-

tentatively screened in prior to issuance of the May 24 Executive Order, who were thereafter repatriated to Haiti, and who might once again take to the seas and be interdicted. According to respondents' own estimate below, there are only approximately 150 Haitians who were once tentatively screened in but were subsequently repatriated to Haiti. See Resp. 92-6144 C.A. Br. 43. Yet the courts below have enjoined implementation of the May 24 Executive Order with respect to *any* Haitian interdictees, without limiting relief to those who had been interdicted once before and tentatively screened in. See Pet. App. 39a, 170a.

Respondents argued below that the class of "screened in" interdictees certified by the district court also includes interdictees who had *not* already been screened in, but who would be in the future if the initial screening that was conducted prior to the May 24 Executive Order were still in place. See Resp. 92-6144 C. A. Br. 45 n.91. Respondents do not, however, renew that strained argument in this Court.

tion such as this was permitted to go forward would establish disturbing precedent for allowing more such litigation in the future.

The Second Circuit's refusal to apply collateral estoppel also raises substantial concerns. It was bad enough that implementation of the interdiction program was disrupted by the series of injunctive orders in *HRC* v. *Baker*, which made it difficult for the Nation to present a coherent response to the Haitian migrant crisis. But after this Court stayed the injunction in *HRC*, the Eleventh Circuit rejected all of the Haitian interdictees' legal challenges, and this Court then denied certiorari (thereby restoring to the President the flexibility he requires in addressing the Haitian migrant crisis), it was far worse for the Second Circuit to revisit those legal issues and enjoin the interdiction program all over again. Due respect for a coordinate Branch and the adverse consequences of renewed injunctive relief should have led the courts below to respect and enforce the doctrine of collateral estoppel with particular resolve. Instead, the Second Circuit strained to avoid collateral estoppel so as to entertain relitigation of the issues decided in *HRC*. See Pet. 15-17.

d. Finally, the propriety of the extraordinary injunctive relief ordered below (or other equitable relief) presents issues of similar importance at the outset of the case. For the question is not simply whether an injunction should have issued once the court of appeals construed 8 U.S.C. 1253(h) (and Article 33 of the U.N. Convention) to apply in this setting. It is also whether the courts below should even have entertained this suit for injunctive or other equitable relief (and therefore even have reached the issue of the application of 8 U.S.C.

1253(h) and Article 33).[5] The bottom line is that they should not have done so, since this suit was brought by aliens abroad who seek to have the courts of the United States declare invalid and halt military operations and related actions undertaken by the President of the United States with respect to the very country (Haiti) of which the plaintiff aliens are residents and nationals. If such a suit is not altogether barred here by the INA or collateral estoppel, injunctive relief (especially *preliminary* injunctive relief) must be denied—and the suit dismissed—under established equitable principles.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted in all respects.

Respectfully submitted.

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[5] See 5 U.S.C. 702(1) (emphasis added) (the Administrative Procedure Act's waiver of sovereign immunity does not excuse courts from their duty "to dismiss any action *or* deny relief on any other appropriate legal or equitable ground").